

§ 10.9

- (5) Examine witnesses;
 - (6) Regulate the course of the hearing;
 - (7) Hold prehearing conferences;
 - (8) Consider and rule upon all motions;
 - (9) Make decisions in accordance with § 10.84 of these rules;
 - (10) Certify interlocutory matters to the Commission for its determination in accordance with § 10.101 of these rules;
 - (11) Take such action as is just or appropriate, if a party or agent of a party fails to comply with an order issued by the Administrative Law Judge;
 - (12) Take any other action required to give effect to these Rules of Practice, including but not limited to requesting the parties to file briefs and statements of position with respect to any issue in the proceeding.
- (b) *Disqualification of Administrative Law Judge*—(1) *At his own request.* An Administrative Law Judge may withdraw from any proceeding when he considers himself to be disqualified. In such event he immediately shall notify the Commission and each of the parties of his withdrawal and of his reason for such action.
- (2) *Upon the request of a party.* Any party or person who has been granted leave to be heard pursuant to these rules may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict or similar bases. Interlocutory review of an adverse ruling by the Administrative Law Judge may be sought without certification of the matter by the Administrative Law Judge, in accordance with the procedures set forth in § 10.101.

§ 10.9 Separation of functions.

- (a) An Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.
- (b) No officer, employee or agent of the Commission who is engaged in the performance of investigative or prosecuting functions in connection with any proceeding shall, in that proceeding or any factually related proceeding, participate or advise in the de-

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cision of the Administrative Law Judge or the Commission except as witness or counsel in the proceeding, without the express written consent of the respondents in the proceeding. This provision shall not apply to the members of the Commission.

[41 FR 2511, Jan. 16, 1976, as amended at 63 FR 55791, Oct. 19, 1998]

§ 10.10 Ex parte communications.

(a) *Definitions.* For purposes of this section:

(1) *Commission decisional employee* means employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding, including, but not limited to:

- (i) Members of the personal staffs of the Commissioners;
- (ii) Members of the staffs of the Administrative Law Judges;
- (iii) The Deputy General Counsel for Opinions and Review and staff of the Office of General Counsel.
- (iv) Members of the staff of the Office of Proceedings; and
- (v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) *Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part;

(3) *Interested person* includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) *Party* includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a proceeding, and a person or agency permitted limited participation or to state views in a proceeding by the Commission.

(b) *Prohibitions against ex parte communications.* (1) No interested person

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outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:

- (i) All such written communications;
- (ii) Memoranda stating the substance of all such oral communications; and
- (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c) (1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.* (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on

that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly cause to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

(Sec. 4, Pub. L. 94-409, 90 Stat. 1246, 1247 (5 U.S.C. 551(14), 556(d) and 557(d)); sec. 101(a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975))

[42 FR 13700, Mar. 11, 1977, as amended at 60 FR 54801, Oct. 26, 1995]

§ 10.11 Appearance in adjudicatory proceedings.

(a) *Appearance*—(1) *By non-attorneys.* An individual may appear pro se (in his own behalf), a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, an officer or employee of a State Commission or of a department or political subdivision of a State may represent the State Commission or the department or political subdivision of the State in any proceeding.